Filed 2/11/04 In re Joshua C. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re JOSHUA C., a Person Coming Under the Juvenile Court Law.	C044142 (Super. Ct. No. JD209431)
DEPARTMENT OF HEALTH & HUMAN SERVICES, Plaintiff and Respondent, v. TERESA S., Defendant and Appellant.	
In re MISTY C. et al., Persons Coming Under the Juvenile Court Law.	C044143 (Super. Ct. Nos. JD209432, JD209433 & JD216065)
DEPARTMENT OF HEALTH & HUMAN SERVICES, Plaintiff and Respondent, v. TERESA S.,	

Defendant and Appellant.

In case No. C044142, Teresa S. appeals from an order of the juvenile court placing her son, Joshua C., into a permanent plan of long-term foster care. In case No. C044143, Teresa appeals from an order terminating her parental rights as to Misty C., Melanie C., and Malissa C., Teresa's daughters. (Welf & Inst. Code, §§ 366.26, 395; undesignated statutory references are to the Welfare and Institutions Code.)

On January 16, 2004, this court ordered the appeals consolidated.

Teresa contends the juvenile court failed to comply with the notice provisions of the Indian Child Welfare Act of 1978 (the Act). (25 U.S.C. § 1901 et seq.) Teresa also claims that imposing the burden of proof on the parent to establish a statutory exception to termination of parental rights is a violation of due process. Agreeing with Teresa that the juvenile court failed to ensure compliance with the Act, we reverse the orders and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Juvenile dependency proceedings in these cases began in August 1997, when the Department of Health and Human Services (DHHS) filed original petitions pursuant to section 300 on behalf of Misty, Malissa, and Joshua. In October 2000, DHHS filed an original petition as to Melanie. Thereafter, DHHS filed several other petitions on behalf of the minors, and at

various times the minors were removed from Teresa, then returned to her, and finally removed again from her custody.

Teresa received numerous reunification services designed to assist her in overcoming substance abuse and improving her parenting skills. Teresa also suffered from mental health difficulties. She visited regularly with the minors, but the minors demonstrated behavior problems. The minors were bonded with Teresa, but one psychologist believed that any detriment to the minors occurring from ending their relationship with Teresa was outweighed by the stability they would receive from placement into a permanent plan.

A July 2001 social worker's report contains conflicting information about the applicability of the Act to the proceedings. That report first noted no Indian heritage existed, but that DHHS had sent notice to the Bureau of Indian Affairs. The report also indicated the Act might apply. Thereafter, in a November 2001 report, DHHS noted that Teresa might be eligible for membership in a Cherokee Indian tribe, and indicated it had notified two Cherokee tribes; both tribes responded the minors were not eligible for tribal enrollment.

At the March 28, 2003, section 366.26 hearing for all four minors, Teresa testified she had learned recently that she might have Indian ancestry through her father's mother. On April 1, 2003, Teresa told the juvenile court her tribal affiliation was Cherokee. Teresa did not know if her paternal grandmother was an enrolled tribal member. However, she told the court that her grandmother's father was an enrolled member of a tribe.

At the May 8, 2003, section 366.26 hearing, the juvenile court noted DHHS had notified all tribes, and that none had responded in a timely fashion. Thereafter, the court ruled the minors were not Indian. Counsel for Teresa argued that Teresa's parental rights should not be terminated pursuant to a statutory exception to adoption based on the relationship existing between Teresa and the minors.

At the conclusion of the section 366.26 hearing, the juvenile court ordered Joshua placed into a permanent plan of long-term foster care and terminated parental rights as to Misty, Melanie, and Malissa. The court also ruled the evidence did not support application of the statutory exception to adoption based on the relationship existing between Teresa and Misty, Melanie, and Malissa.

DISCUSSION

I

In both C044142 and C044143, Teresa contends various deficiencies contained in the notices sent by DHHS to the tribes require reversal of the orders placing Joshua into long-term foster care and terminating parental rights as to Misty, Melanie, and Malissa, and also claims not all tribes were sent notice of the proceedings.

In 1978, Congress passed the Act, which is designed to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children "in foster or adoptive homes which will reflect the unique values of Indian

culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." (25 U.S.C. § 1902; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30 [104 L.Ed.2d 29].)

To effectuate the purposes of the Act, "'child custody proceeding[s]'" involving, among other proceedings, the "'termination of parental rights'" to an Indian child, are subject to special federal procedures (25 U.S.C. § 1903(1)(i)-(iv).) "'Termination of parental rights'" means "any action resulting in the termination of the parent-child relationship." (25 U.S.C. § 1903(1)(ii).)

Among the procedural safeguards imposed by the Act is the provision of notice to various parties. 25 United States Code section 1912(a) provides as follows: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian *and the Indian child's tribe,* by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. *If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner,* who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the

parent or Indian custodian and the tribe or the Secretary . . . ." (Italics added.)

The Act provides for invalidation of dependency proceedings, including a termination action, for violation of the notice provision in an action brought by the Indian child, parent, Indian custodian, or the Indian child's tribe. (25 U.S.C. § 1914.) The Act also contains various evidentiary and other requirements that may be different from state law and procedure. (25 U.S.C. §§ 1912(d), (f), 1915.)

A major purpose of the Act is to protect "Indian children who are members of or are eligible for membership in an Indian tribe[.]" (§ 1901(3).) For purposes of the Act, "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" (§ 1903(4).)

In support of her claim, Teresa relies in part on *In re Kahlen W.* (1991) 233 Cal.App.3d 1414. In that case, the court stated: "Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, the tribe has the right to obtain jurisdiction over the proceedings by transfer to the tribal court or may intervene in the state court proceedings. Without notice, these important rights granted by the Act would become meaningless." (*Id.* at p. 1421.)

In *Kahlen W.*, a social services employee spoke with three different groups of Miwok Indians, attempting to determine the minor's status. In granting the writ sought by the mother of the minor, the appellate court held the department had failed to notify the tribe of its right to intervene in the proceedings, as required by the Act. (233 Cal.App.3d at pp. 1418, 1420, 1424, 1426.)

The court rejected the department's contention that the record showed substantial compliance with the notice provisions of the Act. It noted that all pertinent authority plainly required "actual notice to the tribe of both the proceedings and of the right to intervene." (*In re Kahlen W., supra,* 233 Cal.App.3d at pp. 1421-1422, italics omitted.) Mere "'awareness'" of the proceedings is not sufficient under the Act. (*Id.* at p. 1422.)

Kahlen W. emphasized notice is mandatory, and that ordinarily failure in the juvenile court to secure compliance with the Act's notice provisions is prejudicial error. The only exceptions lie in situations where "the tribe has participated in the proceedings or expressly indicated [it has] no interest in the proceedings." (233 Cal.App.3d at p. 1424; but see *In re Junious M.* (1983) 144 Cal.App.3d 786, 794, fn. 8.)

The *Kahlen W.* court rejected a suggestion by the department that its noncompliance with the notice provisions of the Act was a result of the mother's failure to cooperate by not providing the department with the roll number and by not timely communicating her ancestry. (233 Cal.App.3d at p. 1424.) As

the court pointed out, the Act is intended to protect the interests of the tribe as well as those of the minor's parents. (*Id.* at p. 1425.) Moreover, the minor is entitled to the protection of the Act irrespective of the actions of the parents. (*Ibid.*) Finally, the court rejected the claim that by her silence the mother waived her rights under the Act. (*Ibid.*)

California Rules of Court, rule 1439(f) [further references to rules are to the California Rules of Court], provides in part: "(3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership. [¶] (4) If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice shall be sent to the specified office of the Secretary of the Interior, which has 15 days to provide notice as required. [¶] (5) Notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless and until it is determined that the child is not an Indian child."

Rule 1439(g)(1) provides in part: "Determination of tribal membership or eligibility for membership is made exclusively by the tribe. [¶] (1) A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive."

In this case, Teresa reported Cherokee Indian heritage in her family. Thereafter, the record reflects, DHHS sent notice of the section 366.26 hearing to BIA and also to three Cherokee tribes. The record contains no responses from the tribes; however, BIA responded that more information was required.

The Federal Register lists those Indian tribal entities eligible to receive services under federal law. That list contains three Cherokee entities: Cherokee Nation of Oklahoma, Eastern Band of Cherokee Indians of North Carolina, and United Keetoowah Band of Cherokee Indians of Oklahoma. (67 Fed.Reg. 46328 (July 12, 2002).)

Teresa claims DHHS failed to notify all three Cherokee tribes of the pending section 366.26 hearing. As we have seen, the record refutes that claim: DHHS notified BIA and all three tribes. Teresa also claims the tribes did not receive the required 10-day notice of the proceedings, and that DHHS failed to provide all required information to the tribes. Those claims have merit.

Notice under the Act must include the following information, "if known": the name of the child; the child's birth date and birth place; the name of the tribe in which the child is enrolled or may be eligible for enrollment; names of the child's mother, father, grandparents and great-grandparents or Indian custodians, including maiden, married and former names or aliases, as well as their birth dates, places of birth and death, tribal enrollment numbers, and current and former addresses; and a copy of the petition. (25 C.F.R. § 23.11(a) & (d); 25 U.S.C. § 1952.)

The record in this case contains no notices to the three tribes on forms SOC 318 and SOC 319, nor any indication either form was used by DHHS. Those forms, issued by the State Health and Welfare Agency, are designed to provide notice in compliance

with the Act. (*In re L. B.* (2003) 110 Cal.App.4th 1420, 1425.) Both forms also provide that a copy of the dependency petition shall accompany the forms. Moreover, SOC 318 directs that items not known or not applicable should be marked accordingly.

Although the record reflects DHHS possessed some information about Teresa's family, it inexplicably omitted to send that required information to the tribes. This was error.

We may presume DHHS attached all necessary documents, including copies of the dependency petitions, to the notices it did send to the tribes. (Evid. Code, § 664.) However, as to information such as tribal names and the birthplace of the minors' parents, we cannot countenance the omission of such significant documentation. On this record, the failure of DHHS to perform its duty is inexcusable, and the determination by the juvenile court that the Act did not apply is erroneous. Reversal is required. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)

ICWA provides that "[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days *after receipt of notice* by . . . the tribe . . . ." (25 U.S.C. § 1912(a), italics added.) Here, the record discloses the various notices were *sent after* the hearing date listed in the notices; thus, they were not received *by the tribes* at least 10 days prior to the scheduled hearing. This was error. Moreover, in light of the lack of responses from the tribes, the error is not harmless. (Cf. *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1410-1414.) On remand, DHHS must

ensure that it complies with the 10-day rule in noticing each of the Cherokee tribes.

BIA guidelines state that copies of notices sent to the tribes also shall be sent to BIA. (25 C.F.R. § 23.11(a).) The guidelines are only advisory. However, the California Rules of Court are mandatory, and rule 1439(f)(4), drawn from the language of the Act, states: "If the identity or location of the . . . tribe cannot be determined, notice shall be sent to the [BIA]." (25 U.S.C. § 1912(a).) Because DHHS knew the identity of the possible tribes, notice to BIA was not required.

"[O]ne of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child. [Citation.]" (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.) Notice is meaningless if insufficient and untimely information is provided to assist the tribes in making this determination. In this case, where so little information was provided, it is perhaps not surprising that no responses were received by DHHS, except for a letter from BIA advising DHHS it had provided insufficient information. (Cf. *In re D. T.* (2003) 113 Cal.App.4th 80, 86.) We conclude the notices provided to the tribes were insufficient.

II

In C044143, Teresa claims that requiring her to prove a statutory exception to adoption violates due process.

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four

possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]' [Citation.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

One of the circumstances under which termination of parental rights would be detrimental to the minor is: "The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) The benefit to the child must promote "the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Case law has held the parent has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.) The juvenile court is not required to find termination of parental rights will not be detrimental due to specified circumstances. (*Id.* at p. 1373.)

Even frequent and loving contact is not sufficient to establish the benefit exception absent significant, positive emotional attachment between parent and child. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Brian R.* (1991) 2 Cal.App.4th 904, 924.)

In this case, the record reflects Teresa's counsel argued the exception to adoption contained in subdivision (C)(1)(A) of section 366.26 applied to the proceedings. But nowhere did Teresa or her counsel raise a due process claim during the section 366.26 hearing in this case, although the opportunity to do so existed. "[I]t would be inappropriate to allow a party not to object to an error of which the party is or should be aware . . . ." (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501.) By failing to object at the section 366.26 hearing, Teresa has waived her claim of error on appeal. (*Id.* at p. 502.)

It is arguable a constitutional right cannot be waived by the failure to object in the juvenile court. But the general rule is that constitutional issues not raised at trial are waived on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Ordinarily, even jurisdictional claims are waivable. (*In re B. G.* (1974) 11 Cal.3d 679, 689; *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1200.) In most instances, a parent's due process interests are protected despite the application of the waiver rule because the dependency system has numerous safeguards built into it to prevent the erroneous termination of

parental rights. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1154-1155.)

The waiver rule will not be applied if "'due process forbids it.'" (*In re S. D.* (2002) 99 Cal.App.4th 1068, 1079, citing *In re Janee J.* (1999) 74 Cal.App.4th 198, 208.) Relaxation of the waiver rule is appropriate when an error "fundamentally undermine[s] the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole." (*In re Janee J., supra,* at p. 208.) In this case, we discern no such consequence of imposing the waiver rule.

Even assuming Teresa's claim is construed to consist in part of a general attack on the juvenile court's finding that the exception to adoption did not apply, she would not prevail in this case. In light of the adoptability of Misty, Melanie, and Malissa, the issue here is whether a continued relationship with Teresa would benefit the minors to such a degree that it would outweigh the benefits the minors would gain in a permanent adoptive home. Substantial evidence contained in the record, particularly in the form of both written and oral statements by the psychologist, supports the juvenile court's answer in the negative. On the record before it, the juvenile court could conclude, as it did impliedly, that only adoption, which is the preferred disposition (*In re Ronell A., supra,* 44 Cal.App.4th at p. 1368), would promote the best interests of the minors. The court did not err in rejecting application of the subdivision

(C)(1)(A) exception to adoption to the proceedings. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 821-822.)

DISPOSITION

The orders placing Joshua into long-term foster care and terminating parental rights as to Misty, Melanie, and Malissa are vacated, and the matter is remanded to the juvenile court with directions to order the social services agency to make proper inquiry and to comply with the notice provisions of the Act. If after proper inquiry and notice, a tribe determines that the minor is an Indian child as defined by the Act, the juvenile court is ordered to conduct a new section 366.26 hearing in conformity with all provisions of the Act. If, on the other hand, no response is received or the tribes determine that none of the minors is an Indian child, all previous findings and orders shall be reinstated.

BLEASE, Acting P. J.

We concur:

RAYE, J.

ROBIE, J.